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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

RIN 0648-XD344

Pacific Bluefin Tuna in the Eastern Pacific Ocean; Response to Petition for Rulemaking

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of decision on petition.

SUMMARY: NMFS announces its decision on a petition for rulemaking submitted by the Center for Biological Diversity (CBD). In their petition, CBD requested that NMFS implement additional domestic regulations to address the relative impacts of the U.S. fleet on the Pacific bluefin tuna (PBF) stock, which is overfished and subject to overfishing. Outside of the scope of their petition for rulemaking, CBD also requested that NMFS develop recommendations for international fishery management organizations to take actions to end overfishing of PBF. In light of public comments, NMFS is responding to each element of the petition but referring the specific requests for rulemaking under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) to the Pacific Fishery Management Council (Pacific Council) for further consideration. The decision was made on June 9, 2016.

DATES: [insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Heidi Taylor, NMFS, 562-980-4039.

SUPPLEMENTARY INFORMATION: NMFS received a letter from CBD, an environmental non-governmental organization, on April 9, 2014. In the letter, CBD asserted that PBF (*Thunnus*

orientalis) are not adequately protected under the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP) and that the Pacific Council failed to meet its statutory duty to develop recommendations for domestic regulations in response to NMFS' determination that the PBF stock is overfished and subject to overfishing (78 FR 41033, July 9, 2013). Specifically, CBD petitioned NMFS to amend the HMS FMP or initiate a rulemaking under the authority of the MSA, 16 U.S.C. 1801 *et seq.*, to include PBF as a prohibited species until the stock is rebuilt, thereby placing a moratorium on retention of PBF by U.S. fishing vessels. As an alternative, CBD proposed that NMFS establish annual catch limits and a permanent minimum size requirement to protect PBF of age classes 1 and 2 and that NMFS amend the HMS FMP to establish specific reference points for PBF to guide science-based management of the stock. Outside of the scope of the petition for rulemaking, CBD requested that NMFS develop recommendations to the Secretary of State and Congress to end PBF overfishing at the international level.

Public Input on the Petition

NMFS published a **Federal Register** document on July 24, 2014 (79 FR 43017), to solicit public comments and information on both the petition for rulemaking and the non-rulemaking requests contained in CBD's letter. NMFS specifically requested that the public provide comments on the social, economic, and biological impacts from implementing any of the petitioner's requests to assist NMFS in its evaluation and in determining what rulemaking action(s), if any, were appropriate.

NMFS received 29 written comments, 2 emails, and 431 individually submitted electronic comments via the Federal e-Rulemaking Portal. CBD submitted several electronic comments with 23,826 identical form letters attached. The majority of distinct comments came from the

recreational fishing community, especially sportfishing anglers, while some came from the commercial passenger fishing vessel (CPFV) industry. Of the individually submitted comments, 323 included rationales for opposing a prohibition on fishing for PBF. Additionally, 253 of the individually submitted comments included suggestions for alternative management measures. A small minority of the public comments received expressed their support for banning fishing for PBF in both U.S. waters and the high seas. NMFS considered each of the comments in the analysis of CBD's petition.

Analysis of Petition and Decision

Following NMFS' determination that the petition for rulemaking in CBD's letter contained enough information to enable NMFS to effectively consider the substance of the petition (79 FR 43017, July 24, 2014), NMFS evaluated the petitioner's requests with regard to achieving the management and conservation objectives of ending overfishing and rebuilding the PBF stock. PBF is a trans-Pacific stock that is harvested by fishing vessels of many different nations. PBF catch by U.S. West Coast fisheries has constituted approximately 2 percent of the Pacific-wide catch in recent years (2008-2014) (ISC, 2015). When NMFS received the petition from CBD, it had already notified (in a letter dated April 8, 2013) the Pacific Council of its duties under section 304(i) of the MSA, 16 U.S.C. 1854(i), received a response from the Pacific Council (dated April 1, 2014), and engaged with the Council in developing both international and domestic measures to reduce fishing mortality and aid in rebuilding the PBF stock. These measures are described in NMFS' response to the petition, which is summarized below. At this time, NMFS views the Pacific Council's recommendations and adopted measures as sufficient to fulfill international and domestic obligations to conserve the PBF stock and address the relative impact of U.S. vessels. However, given the role of the Pacific Council in MSA rulemakings and

amendments to the HMS FMP, NMFS refers the specific requests related to domestic fisheries management (i.e., requests 1 and 2 below), as well as NMFS input on these matters, to the Pacific Council for further consideration. A more detailed response to the petition, as well as access to public comments, is available via the Federal eRulemaking Portal:

<http://www.regulations.gov>, identified by “NOAA-NMFS-2014-0076.”

Petition Request 1: CBD requested that NMFS add PBF to the list of prohibited species in the HMS FMP due to the depleted status of the stock. CBD contended that doing so would be symbolically powerful and would have little to no economic impact on U.S. fishermen.

Response to Request 1: There is little evidence to suggest that a unilateral prohibition on the retention of PBF by U.S. West Coast fishermen will either end overfishing or have a consequential impact on reducing overfishing because catch of PBF by U.S. West Coast-based fleets represents a small portion of the total Pacific-wide catch. However, it is clear to NMFS that such a prohibition would economically harm both U.S. West Coast commercial and recreational fisheries and fishing communities. PBF is a marketable species and is economically important to U.S. West Coast fishermen who target highly migratory species. The commercial coastal purse seine fleet opportunistically targets PBF when they are in the U.S. exclusive economic zone (EEZ). While the primary targets for this fleet are small coastal pelagic species, such as Pacific sardine, Pacific mackerel, and market squid, PBF is part of their historical and current fishing portfolio. PBF are also incidentally caught in the commercial large-mesh drift gillnet (DGN) fishery, the albacore surface hook-and-line fishery, and the deep-set longline fishery. For the directed fishing fleet (purse seiners), revenue from PBF alone constitutes about 2 to 4 percent of the total revenue from fishing. For the DGN fleet, the annual average PBF revenue share is about 3 percent. Despite the fact that U.S. West Coast-based sport fishermen are

not permitted to sell their catch, other positive regional economic impacts generated by recreational fishing activities, including personal enjoyment of and willingness to pay for recreational fishing, could be negatively impacted by prohibiting all retention of PBF by U.S. vessels.

As part of their biennial management process, the Pacific Council considered impacts to recreational fisheries when adopting measures under MSA section 304(i) to address the relative impact of U.S. fisheries on the PBF stock. During deliberations, the Pacific Council considered how allowing anglers to catch and retain PBF might affect decisions to take recreational fishing trips. Specifically, the Pacific Council considered an analysis of the potential impacts of recreational bag and possession limit reductions. This analysis was based on CPFV logbook data from the 2008 to 2013 fishing seasons and included estimates for economic and employment losses due to a moratorium on U.S. West Coast-based PBF retention (e.g., reducing the current PBF bag limit from 10 to 0 fish). The analysis has become part of a Southwest Fisheries Science Center Working Paper, which includes estimated losses of up to \$13.8 million in annual trip expenditures and \$25.8 million in annual gross sales for southern California due to a decrease in the number of CPFV trips that target PBF (5,275 angler days in U.S. waters and 56,338 angler days in Mexico waters). Additionally, the 0-bag limit scenario was estimated to generate a potential employment loss in the southern California economy of up to 178 full-time equivalent jobs (Stohs, 2016).

NMFS regards the United States' continued participation in the international decision-making processes of the two regional fishery management organizations (RFMOs) – the Inter-American Tropical Tuna Commission (IATTC) and the Western and Central Pacific Fisheries Commission (WCPFC) – as critical to effectively ending overfishing of PBF and rebuilding the

Pacific-wide stock. Other nations have not indicated they would follow suit if the United States were to unilaterally impose a moratorium on PBF retention. NMFS will continue to work with the U.S. Delegations to the two RFMOs to garner consensus from other PBF fishing nations to achieve far greater reductions in total fishing mortality than the reductions that could be achieved by prohibiting retention for the relatively small-scale U.S. fisheries alone. Further, NMFS will continue to work with the Pacific Council to adopt and implement, if necessary, additional management measures to address the relative impacts of the U.S. fleet.

Petition Alternative Request 1: As an alternative to a prohibition on the retention of PBF, CBD requested that NMFS establish annual catch limits (ACLs) and a permanent minimum size limit for protecting age class 1 and 2 PBF. CBD requested implementation of ACLs, if not a total prohibition on retention, which it asserts is a necessary step towards achieving the conservation objective of ending overfishing and rebuilding the PBF stock.

Response to Alternative Request 1: NMFS does not agree with CBD's assertion that applying ACL requirements to the U.S. portion of the PBF catch limit would lead to ending overfishing. NMFS has already imposed PBF catch limits for U.S. commercial fisheries in the eastern Pacific Ocean (EPO) under the Tuna Conventions Act. Imposing additional catch limits under the authority of MSA would inflict additional costs on U.S. industry for little conservation gain. Further, the Pacific Council did not adopt ACLs for PBF because it is a transboundary stock under international management, and as such is exempt from ACL requirements (see paragraph (h)(2)(ii) of the National Standard 1 guidelines at 50 CFR 600.310).

NMFS considers CBD's request for a recreational size limit to mean that any PBF of age class 1 or 2 caught by U.S. anglers would have to be released. Unlike catch or retention limits, a size limit regulation is less likely to prohibit or deter targeting of PBF. Maunders and Aires-da-

Silva (2014) argue that unless a fishery can completely control its selectivity, or unless released fish have a high survival rate, it is very difficult to implement and evaluate the effects of a minimum size limit. Given the current gear used and the nature of fishing for PBF in the EPO, NMFS is not convinced, at this time, that size limits would be an effective management tool for recreational fisheries that catch PBF in the EPO, or that they would be accepted by the IATTC and other PBF fishing nations.

Lastly, NMFS shares CBD's interest in ending overfishing and is pleased to report progress on the adoption and implementation of meaningful measures to both aid in the rebuilding of the PBF stock and to address the relative impacts of the U.S. fleet. In October 2014, the IATTC adopted Resolution C-14-06 (*Measures for the Conservation and Management of Pacific Bluefin Tuna in the Eastern Pacific Ocean, 2015-2016*), which included a 40 percent reduction in the commercial catch limits for 2015 and 2016 compared to the 2014 level. NMFS published a rule to implement these catch limits for the U.S. commercial sector on July 8, 2015 (80 FR 38986). On July 28, 2015, NMFS implemented a reduction in the daily PBF bag limit from 10 to 2 PBF and a reduction in the maximum multi-day possession limit from 30 to 6 PBF for U.S. West Coast recreational fisheries (80 FR 38986), based on the Pacific Council's recommendation. NMFS estimates that this action will result in an approximately 30 percent reduction in U.S. recreational catch. These reductions in commercial and recreational catch of PBF are consistent with IATTC scientific staff advice.

Petition Request 2: CBD requested that NMFS amend the HMS FMP to establish specific values for reference points, such as maximum fishing mortality threshold (MFMT) and the minimum stock size threshold (MSST), for PBF. CBD asserted that specific values are essential to science-based management, and that "[t]he lack of specific values for PBF reference points

has already crippled scientists' ability to provide conservation advice.”

Response to Request 2: NMFS agrees with CBD that reference points assist in science-based management. Given the availability of subsequent years of PBF stock assessments, continued work to evaluate reference points, and the Pacific Council's upcoming biennial management cycle, NMFS encourages the Council to consider the adequacy of the FMP reference points and/or proxies for the PBF stock. As described in paragraph (b)(2)(iv) of the National Standard 1 guidelines, reference points include status determination criteria (SDC) such as MFMT and MSST or their proxies, maximum sustainable yield (MSY), acceptable biological catch (ABC), and ACL. As discussed earlier, because PBF is an internationally assessed and managed stock and meets the international exemption criteria of the National Standard 1 guidelines, an ABC and ACL was not included in the HMS FMP. However, the HMS FMP includes SDC and an estimate for MSY based on a mean of stock-wide catches from 1995 to 1999. The reference points of the HMS FMP are considered guideposts for managing the PBF stock and require being able to determine and monitor the effects of fishing. Nonetheless, the effects of fishing are often difficult to determine for HMS species like PBF. For example, trends in catch and effort may reflect more than abundance (e.g., fishing success may be affected by schooling behavior and/or environmental effects on the availability of species). Though SDC are included in the HMS FMP, specific values for MFMT and MSST have not been identified for PBF. Rather, NMFS uses these guideposts in concert with other available biological reference points to evaluate the status of the PBF stock.

NMFS determined stock status conditions of PBF based on the stock assessments of the International Scientific Committee for Tuna and Tuna-like Species in the North Pacific (ISC) (e.g., 78 FR 41033, July 9, 2013; 80 FR 12621, March 10, 2015), the primary scientific body that

routinely conducts stock assessments on temperate tuna and tuna-like species for the North Pacific. Its PBF Working Group (PBFWG) is responsible for conducting PBF stock assessments; it annually reports on stock status and provides conservation advice. Despite the fact that reference points have not yet been adopted by the IATTC or the WCPFC, the PBFWG routinely reports stock size and fishing mortality relative to a range of biological reference points (e.g., ISC, 2014). NMFS considers these PBF assessments to be the best scientific information available for determining PBF stock status under the MSA and for notifying the respective Councils of their responsibilities under MSA section 304(i). NMFS works with the Pacific Council to ensure that results of international assessments and status updates for management unit stocks of the HMS FMP, including PBF, are routinely made available to the public in the Stock Assessment and Fishery Evaluation reports.

Ideally, there would be continuity in reference points used for international and domestic management of fishing on the PBF stock. However, the Pacific Council and NMFS are not required to adopt reference points that are identical to the reference points adopted by the IATTC or WCPFC. Further, the lack of internationally agreed upon reference points for PBF should not preclude the Pacific Council from developing or refining reference points and/or proxies in accordance with National Standard 1.

Request 3 (not part of the petition for rulemaking): Aside from the petition for rulemaking discussed above, CBD also cited section 304(i) of the MSA and requested that NMFS develop and submit recommendations to the Secretary of State and Congress for international actions that will end overfishing in the fishery and rebuild the PBF stock. Specifically, CBD provided the following recommendations: (1) establish a high seas moratorium on all fishing, (2) implement a Pacific-wide minimum size for PBF catch; and (3)

achieve a steep reduction in PBF quota for all countries to meet rebuilding targets that are based on established reference points. NMFS addresses each of these topics below.

Response to Request 3: This request was not a part of CBD's petition for rulemaking under the MSA, and therefore is not being referred to the Pacific Council for further consideration. Nonetheless, NMFS found merit in certain aspects of CBD's request for additional international recommendations. NMFS' response to these additional requests is included below.

First, section 304(i)(2)(B) of the MSA, cited by CBD, requires the appropriate fishery management councils, and not NMFS,¹ to develop recommendations to the Secretary of State and Congress to end overfishing and rebuild overfished stocks. As stated earlier, the Pacific Council had already provided their recommendations for international actions to NMFS on April 1, 2014, thereby addressing their obligations under section 304(i)(2)(B) of the MSA. NMFS acted on the Council's recommendations when providing support to the U.S. Delegations for both the IATTC and WCPFC.

As for CBD's requests for NMFS to make specific recommendations to Congress and the State Department, NMFS is not convinced at this time that either closing the high seas to fishing or establishing size limits for PBF would be effective management tools for rebuilding the PBF stock or serving national interests. The conservation benefits of closing the high seas to fishing, at least in terms of changes in total catch, will likely be determined by the degree of movement of targeted species, as well as the mobility of vessels and opportunities to exploit the stock in alternative areas (Davies *et al.*, 2012). Furthermore, most of the commercial catches of PBF in the EPO are taken by purse seiners and nearly all of those catches have not been made on the high seas; instead, most have occurred west of Baja California and California, within about 100 nautical miles of the coast, between about 23°N and 35°N (IATTC, 2014). Similarly, most of the

¹ Except for Atlantic highly migratory species, which are managed directly by NMFS.

recreational PBF catch occurs in the EEZs of Mexico and the United States. In the western Pacific Ocean, PBF is primarily caught from Taiwan to Hokkaido, with troll, purse seine, trap, drift net, and other gear in coastal or nearshore areas. Pacific-wide catches of PBF on the high seas are primarily taken by the longline fleets of Japan, Korea, and Chinese Taipei. However, these fleets catch small amounts of PBF on the high seas in comparison to catches from other fishing grounds (Bayliff, 2000; ISC, 2015).

Lastly, NMFS remains committed to working with the U.S. Delegations to the IATTC and WCPFC to promote Pacific-wide conservation and management measures, a rebuilding plan, and a long-term management framework with appropriate and compatible reference points. As previously mentioned, both RFMOs adopted (and NMFS implemented) more restrictive measures for 2015 and 2016 than in previous resolutions. The ISC evaluated these measures in the context of future stock assessments, spawning stock biomass projections, and progress towards the provisional multi-annual rebuilding plan for PBF adopted by the WCPFC. The United States submitted a proposal to the 89th Meeting of the IATTC to aid in establishing a rebuilding plan for PBF that includes a paragraph about establishing reference points and harvest control rules for the long term management of PBF. The United States also submitted a proposal for a rebuilding plan and a proposal for a precautionary management framework for PBF to the 11th Meeting of the Northern Committee, which is a subsidiary body of the WCPFC that develops recommendations for PBF management measures. These proposals can be found here: <https://www.wcpfc.int/system/files/NC11-DP-03%20%28PBF%20rebuilding%20plan%29.pdf> (IATTC proposal) and <https://www.wcpfc.int/meetings/11th-regular-session-northern-committee> (Northern Committee proposals). While neither proposal was adopted, the United States plans to submit proposals intended to contribute to the rebuilding of the stock at the upcoming IATTC

and Northern Committee meetings in 2016.

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Authority: 16 U.S.C. 1801 *et seq.*

Dated: June 10, 2016

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